

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAY -9 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

CONRAD E. SALCIDO,

Appellant.

)
)
) 2 CA-CR 2006-0306
) DEPARTMENT A
)

MEMORANDUM DECISION

) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)
)

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR-91-280

Honorable Robert Duber, II, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General

By Randall M. Howe and Carmen Dapkus,
a student certified pursuant to Rule 38, Ariz.
R. Sup. Ct., 17A A.R.S.

Tucson
Attorneys for Appellee

Emily Danies

Tucson
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 After pleading guilty pursuant to a plea agreement, appellant Conrad Salcido was convicted in 1992 of two counts of attempted child molestation and one count of

attempted sexual conduct with a minor. The trial court sentenced him to prison terms totaling eleven years on two of the counts, to be followed by lifetime probation on the remaining count. Salcido began serving the probationary term in 2003. But, in February 2006, Salcido's probation officer filed a petition to revoke probation alleging, inter alia, that Salcido had been terminated from the Gila County Sex Offender Treatment Program, a violation of the condition of probation requiring him to "participate in sex offender treatments and programs . . . as directed by his probation officer." After a revocation hearing, the trial court found the state had proved by a preponderance of the evidence that Salcido had violated this condition of probation. The trial court revoked probation and sentenced Salcido to a mitigated prison term of nine years. This appeal followed.

¶2 Salcido contends the trial court's order revoking his probation violated his due process rights. He argues that the condition of probation he was found to have violated was vague, depriving him of adequate notice of what would constitute a failure to participate in sex offender treatment. He maintains the requirement is subjective as well, resulting in an arbitrary determination that he had failed to comply notwithstanding his attendance at all sessions, except for when he had a medical excuse. Salcido also argues that the reliance by the therapist Ralph Camping, the probation officer Cheryal Taylor, and the trial court on his three failed polygraph tests in determining he had not actively participated in the program was improper because, he contends, polygraph tests are not reliable. Finally, Salcido argues

he should be permitted to participate in another program in Maricopa County, claiming the Gila County program is not modeled on current national sex offender treatment programs.

¶3 The state is required to establish by a preponderance of the evidence that a defendant violated conditions of probation as alleged in the petition to revoke probation. *See* Ariz. R. Crim. P. 27.8(b)(3), 17 A.R.S.; *see also State v. Stotts*, 144 Ariz. 72, 85, 659 P.2d 1110, 1123 (1985). “We will uphold a trial court’s finding that a probationer has violated probation unless the finding is arbitrary or unsupported by any theory of evidence.” *State v. Thomas*, 196 Ariz. 312, ¶ 3, 996 P.2d 113, 114 (App. 1999). We cannot say the trial court’s decision here was arbitrary or unsupported by the evidence.

¶4 As the state points out, in June 2003, Salcido agreed to certain modifications of the conditions of his probation. Among them was that polygraph assessments could be used to “assist in treatment, planning and case monitoring.” Additionally, he was specifically informed that information from the treatment programs could be “used against [him] in legal proceedings.” Although Salcido subsequently moved to vacate these modifications, the court rejected his request. And thereafter, he agreed to the modifications emphasizing that he was to participate in treatment as directed by his probation officer and that he was to “participate in screenings, assessments, and counseling provided by Psychological Consulting Services as directed by the Gila County Adult Probation Department.”

¶5 Although Salcido is correct that there is a subjective element to the determination that he did not meaningfully participate in the program, that fact alone does not mean his due process rights were violated or the decision is therefore arbitrary. Nor has he shown that he was not told what was expected of him. From the conditions themselves and the modifications, he was informed that he was to follow the directive of the probation officer and he was to participate in the program. Participation implies cooperation. And, during treatment, Salcido was told what was expected of him. He knew the significance of the polygraph testing; he was told what was expected of him in group sessions so he could progress and demonstrate an understanding of what he had done to his victims; and he was told the kinds of behaviors that were inappropriate.

¶6 With respect to the polygraph testing, as we previously stated, Salcido agreed to it. The trial court did not err in relying on the test results over Salcido's objection. The court explained that the test was used to measure a person's success and that the therapist's reliance on it as such was reasonable. The court further noted that reliance on three consecutive deceptive tests was reasonable because of the manner in which the failures were utilized. In this context, the use of the polygraph test results was not error.

¶7 Additionally, the testimony presented at the violation hearing established the method of treatment that was used, the means of measuring whether Salcido was truly participating in a meaningful way, and the basis for the conclusion that he was not doing so, which resulted in his unsuccessful termination from the program. Although we agree there

may be a subjective aspect to a therapist's evaluation of a patient, there was ample evidence presented at the evidentiary hearing to show the process was not arbitrary but was scientifically based and did follow a defined method. Camping's testimony established the method by which Salcido was assessed and the basis for Camping's conclusions that Salcido was "unwilling to do the work necessary to progress in treatment" and that his prognosis to change was poor. As Camping explained, he reached those conclusions and the conclusion that Salcido was not "openly participating in group" based on the three polygraph test results and "continually having him redefine some of the very most basic terms that would reveal somebody taking full responsibility for himself."

¶8 We note, too, that the court questioned Camping about the basis for his conclusions, voicing its concern that Salcido had not been terminated from the program as unsuccessful simply because he had failed three polygraph tests. As a result of the court's questioning, Camping explained how Salcido's termination from the program was based on the test results combined with his failure to recognize he was not forthrightly disclosing information, which is necessary for successful treatment. The court even asked Camping, "You're aware that there are some questions about the scientific validity of polygraph examinations being able to identify liars and people being honest?" This led to a lengthy explanation by Camping of the process. And the court asked Camping whether Salcido had sufficient cognitive abilities to understand what was expected of him so he could participate in the process. Camping testified Salcido could and did understand. Still, the court asked

for specific examples of Salcido's conduct that showed he was not meaningfully participating.

¶9 We summarily reject Salcido's contention that the program in Gila County does not comport with national standards. He did not make this argument below, and it is therefore waived absent fundamental error. *See State v. Bolton*, 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995). Salcido has not established fundamental, prejudicial error in this regard. Similarly, we reject Salcido's insistence on being placed in another program. He did not ask for that below, nor are we convinced he would have been entitled to another chance after failing at the program where he had spent more than two and one-half years. *See Stotts*, 144 Ariz. at 87, 695 P.2d at 1125 (trial court did not arbitrarily revoke probation when appellant's "alternative plan" for probation "was neither viable nor seriously proposed").

¶10 We affirm the trial court's order revoking Salcido's probation and the sentence imposed.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge